Supreme Court, U.S.
FILED
JUN 25 2004

No. 031720

In The
Supreme Court of the United States

EDDIE D. UNDERWOOD,

Petitioner,

versus

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari
To The Fifth Circuit Court Of Appeals
At New Orleans, Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. DOES THE ONE-YEAR STATUTE OF LIMITATIONS IMPOSED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT CREATE AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS IN VIOLATION OF ARTICLE I, §9, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES?

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for EDDIE UNDERWOOD certifies that this is a civil case (a writ of habeas corpus) arising out of a state court criminal conviction and that the persons having an interest in the outcome of this case are the Appellee, the State of Texas, by and through the Director of the Texas Department of Criminal Justice, Doug Dretke and the following persons and counsel:

JUDGES:

STATE COURT:

Honorable Judge
266th Judicial District Court
Erath County, Texas

FEDERAL COURT:

Honorable United States Judge Terry Means
U.S. District Court for the Northern District of Texas
United States Courthouse
Fort Worth, Texas

Honorable United States Magistrate Judge Paul D. Stickney
United States Courthouse
Dallas, Texas

APPELLANT:

Eddie D. Underwood
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CERTIFICATE OF INTERESTED PARTIES
– Continued

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Trial Prosecutors

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CERTIFICATE OF INTERESTED PARTIES	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. Course of Proceedings and Disposition Below	4
B. Statement of Facts	5
REASONS FOR GRANTING THE WRIT	13
DOES THE ONE-YEAR STATUTE OF LIMITATIONS IMPOSED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT CREATE AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS IN VIOLATION OF ARTICLE I, §9, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES?	14
CONCLUSION AND PRAYER	17

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 15

Ex Parte Underwood, 52,780-01 4

Green v. White, 223 F.3d 1001 13

Swain v. Pressley, 430 U.S. 372 ..... 13, 14, 15

Underwood v. State, 1021-00 4

Underwood v. State, 11-99-00013-CR 4

STATUTES:

28 U.S.C. §1254 2

28 U.S.C. §1257 2

28 U.S.C. §2101 2

28 U.S.C. §2104 2

28 U.S.C. §2255 15

CONSTITUTION:

U.S. Const., Article I, §9 2

U.S. Const., Fifth Amendment 3, 16

U.S. Const., Sixth Amendment 3

U.S. Const., Fourteenth Amendment 3, 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Stephen B. Bright, *Elected Judges and the Death Penalty in Texcas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable To Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000)..... 16

Innocence and Death, 82 N. C. L. Rev. 61 (2003)..... 16

APPENDIX

APPENDIX A .....App. 1
APPENDIX B .....App. 3
APPENDIX C .....App. 11
APPENDIX D .....App. 15
APPENDIX E .....App. 16
APPENDIX F .....App. 18
APPENDIX G .....App. 20
APPENDIX H .....App. 24
APPENDIX I .....App. 36
APPENDIX J .....App. 37
APPENDIX K .....App. 38

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the final decision of the Federal Fifth Circuit Court of Appeals in this case denying Petitioner the right to file a federal writ of certiorari due to the passage of the one-year statute of limitations. The Opinion was issued on April 6, 2004 and no motion for rehearing was filed.

OPINIONS BELOW

Petitioner alleges that his unlawful confinement results from a judgment of conviction in Cause No. 10689 in the 266th Judicial District Court of Erath County, Texas, for the offense of engaging in organized criminal activity involving an alleged kidnaping and assault. Punishment was assessed at 99 years confinement and a fine of $10,000.00.

A copy of the judgment is attached hereto as required. (See Appendix G).

Petitioner's initial appeal was decided by the Texas Eleventh Court of Appeals in an unpublished opinion affirming the conviction in cause number 11-99-00013-CR on March 23, 2000. (Appendix H). Petitioner timely filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals. The Petition was denied by the Texas Court of Criminal Appeals on September 27, 2000. (Appendix I). Petitioner then filed in the State courts an application for a Writ of Habeas Corpus on November 28,

2001. The Texas Court of Criminal Appeals denied the Application for Writ of Habeas Corpus without a written order and without a hearing on August 21, 2002. (Appendices J and K). Under the Antiterrorism and Effective Death Penalty Act, the case became final on direct appeal on December 26, 2000.

Petitioner filed for habeas relief in the Federal District Court in Fort Worth, Texas on April 7, 2003. The Honorable Judge Terry R. Means dismissed the Petition as time barred under the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations. (Appendix C). Petitioner sought a certificate of appealability from the United States District Court but it was denied. (Appendix F). Petitioner then sought a certificate of appealability from the Fifth Circuit Court of Appeals which denied the application on April 6, 2004. (Appendix A).

JURISDICTION

This Honorable Court has jurisdiction to review a final decision of a court of appeals in which a decision could be had pursuant to 28 U.S.C. §1254, 28 U.S.C. 1257, 28 U.S.C. §2101, and 28 U.S.C. §2104.

STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Article I, §9, clause 2, provides:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Fifth Amendment to the Constitution of the United States of America, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America, which reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States of America, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

The Petitioner Mr. EDDIE D. UNDERWOOD, was indicted for engaging in organized criminal activity. A jury convicted Mr. Underwood and it assessed a sentence of 99 years incarceration and a $10,000.00 fine.

The Texas Eleventh Court of Appeals affirmed his conviction and sentence on direct appeal in an unpublished opinion in *Underwood v. State*, 11-99-00013-CR (Tex.Ct.App. – Eastland, 2000, Pet ref'd). The Texas Court of Criminal Appeals, the highest Court of Criminal jurisdiction in Texas, refused review in *Underwood v. State*, 1021-00. Petitioner filed an application for writ of habeas corpus in State court which was denied by the Texas Court of Criminal Appeals on August 21, 2002 in *Ex Parte Underwood*, 52,780-01.

Petitioner took his case to federal court on April 7, 2003 by filing an application for writ of habeas corpus in the federal district court in Fort Worth, Texas. This application for writ of habeas corpus was denied on September 2, 2003. An application for a certificate of appealability was denied by the district court. The Fifth Circuit Court of Appeals denied a timely filed application for a certificate of appealability on September 25, 2003.

B. Statement of Facts.

At Petitioner's trial, the State presented evidence that Curtis Coffee, Ryan Brock and Daniel Garcia kidnaped Misty Powers in Stephenville, Texas. (RR 4:211-217) The State's evidence also showed that Petitioner was not present during the kidnaping nor during the events immediately following the kidnaping. (RR 3:48-137)

The State tried Petitioner's case before the cases of co-defendants Coffee, Brock and Garcia. Garcia testified for the State. (RR 4:190-281) Coffee and Brock did not testify in the trial, because their attorneys advised them that any testimony they gave could be used against them in their trials. (Petitioner attached affidavits from Brock and Coffee to his application for writ of habeas corpus in the Federal District Court). Nevertheless, they expressed a willingness to testify in any post-conviction hearing and have given affidavits as new evidence not previously available that Curtis Coffee, Ryan Brock and Daniel Garcia on May 4, 1998, did kidnap and abduct Misty Powers from a residence in Stephenville, Erath County, Texas. The affidavits show that the kidnaping was not preplanned nor prearranged and was a spontaneous decision made by Curtis Coffee, Ryan Brock and Daniel Garcia at or near the time of the actual kidnaping.

Coffee and Brock indicated a willingness to testify and have given affidavits that Petitioner did not plan nor direct them to kidnap Misty Powers, nor did Petitioner know about their kidnaping of Misty Powers until the next day, when Brock, Garcia and Misty Powers arrived in Abilene, Taylor County, Texas according to the affidavits. Petitioner in fact freed Misty Powers from their custody

and told her to drive herself back to Stephenville in the van. (RR 3:147-148)

Misty Powers, the victim of the kidnaping, testified at trial that she saw Petitioner the day after the kidnaping in Abilene, Taylor County, Texas. (RR 3:137-139) She testified at his trial that he did not physically restrain her in any way and that he cut the tape from her face and let her loose. (RR 3:140-141, 196) She testified that Petitioner asked if she was alright, was she hungry, thirsty or did she need to go to the bathroom. (RR 3:143, 150) She testified that when she saw him that she was not afraid and knew Petitioner was not going to hurt her and everything would be okay. (RR 3:1-50, 198-199) She testified that when she and he were left alone in the van, he exited the vehicle and told her to drive home, which she did. (RR 3:147-148) Misty Powers gave Petitioner an affidavit in the habeas court that had Petitioner's defense counsel asked the right questions, she, Misty Powers, would have testified that she did not believe that Petitioner sent anyone to kidnap her but that she believed that the kidnaping was a spontaneous act and decision initiated by Ryan Brock. (Misty Powers' Affidavit of Fact was a part of the federal habeas petition). Misty Powers has indicated that she will so testify in a post-conviction hearing if one were held.

Daniel Garcia was a juvenile at the time of the offense and was certified to stand trial as an adult. (RR 4:190) At Petitioner's trial, Garcia testified that the State had made no deals nor made any promises in exchange for his testimony. (RR 4:191) Nevertheless, he received 10 years deferred adjudication probation and a fine of $2,500.00 in his case after he testified against Petitioner. Garcia testified that the day after the kidnaping, Petitioner threatened to shoot Misty Powers, while Petitioner was

flipping the cylinder of the gun. (RR 4:232-236) Under his testimony, she was still taped up and she started begging him to let her go, that she had the money so let her go. (RR 4:233) Garcia testified that the van stopped near a lake for a while and everybody got out except Misty. (RR 4:233-234) Then Petitioner went back to the van and changed his mood from killing her. (RR 4:235) Garcia testified that applicant said, "Caught me on a good day. I would have shot you." *Id.* Garcia said that Petitioner continued to threaten Misty with the gun, flipping the cylinder. (RR 4:236) Misty was lying there all taped up under his testimony. *Id.* Garcia testified that applicant said, "You go back and tell your friends – everyone that owes me money that I want my money and I'm not playing around." (RR 4:236) Basically that applicant set an example with Misty Powers for the rest. *Id.* Misty said that she had the money, then Petitioner took the duct tape off her eyes and mouth and said that he would let her go, just tell everybody back home what's going on; he wasn't messing around anymore; he wanted his money. (RR 4:237) Garcia's testimony is refuted by Misty Power's affidavit.

Misty Powers has given an affidavit as new evidence that Garcia's testimony was false. (Misty Powers' Affidavit of Fact is a part of the habeas petition). Petitioner never threatened to kill her. Petitioner never threatened her with a gun by flipping the cylinder or in any other way. *Id.* Misty Powers could have so testified at trial but was never asked the questions by Petitioner's defense attorney. *Id.* Misty Powers did, however, according to her affidavit, tell the District Attorney, when he questioned her before the trial, that such threats never happened. *Id.*

Terry Johnson has given a post-conviction affidavit as new evidence, which affidavit is attached to the federal

habeas petition, that around May 2, 1998, Petitioner came to Johnson's sister's home. Petitioner said that Ryan Brock left Abilene to go visit his family and friends. Petitioner and Johnson stayed at his sister's house all day. *Id.* The next day on May 3, 1998, Curtis Coffee came to Johnson's sister's house and said he was going to see Ryan Brock in Stephenville. Coffee never mentioned a kidnaping would happen. After Coffee left, Petitioner and Johnson went to a club and returned to the sister's house late. When they awoke the next day, May 4th, they ate then went to a club then went back to Johnson's sister's house. The next day, May 5th, Ryan Brock called and said he was in some kind of trouble and was going to stop by. About ten minutes later, Brock showed up looking for applicant. Petitioner told Johnson and Johnson's sister that he was going with Ryan Brock because Brock got into some trouble. Petitioner said that he did not know what kind of trouble Brock got into, but applicant would be back in an hour or so. An hour or so later, Petitioner called and said that Brock messed some things up and Petitioner did not want anything to do with it and that Petitioner was coming to the house, so Petitioner and Johnson could drive and show Daniel Garcia where I-20 was. *Id.* Johnson stated that Petitioner was innocent of the crime, because Petitioner was with him from May 2nd to May 5th, 1998, and Petitioner did not know about the kidnaping. Jana J. Pittman has given a post-conviction affidavit as new evidence. (Jana J. Pittman's Affidavit of Fact is included in the federal habeas petition). She stated in the affidavit that a few days before the kidnaping of Misty Powers, Ryan Brock went to Stephenville to visit relatives. A few days after Brock's departure, Petitioner and Terry Johnson showed up at Pittman's house for dinner, which was the same night Misty Powers was kidnaped. Pittman stated

that she knows for a fact that Petitioner did not kidnap Misty Powers nor did he send anyone to kidnap Misty Powers. *Id.* She knows that, because Johnson and Petitioner were using her car that evening. Johnson and Petitioner arrived at Pittman's house about 4:30 p.m., hung out at the house, and they all ate dinner around 7:30 p.m., then they asked to borrow Pittman's car again to go to a local bar. They arrived back at Pittman's house about 12:20 - 1:00 a.m., and went to Terry Johnson's room where they both fell asleep. The next morning Pittman took a telephone call from Ryan Brock who said he wanted to talk to Petitioner. About ten minutes later, Brock picked up Petitioner; then 30 to 45 minutes later Petitioner called Pittman and asked her to wake up Terry Johnson and said he was coming back to her house. Petitioner Mr. Underwood wanted to know if Pittman would let him and Terry Johnson use her car so they could show Daniel Garcia the way back to Stephenville, and then they would come back to the house. Michelle Wilson was called as a witness for the State. (RR 4:80) She testified that Ryan Brock told her that Petitioner sent him to Stephenville. (RR 4:92) Michelle Wilson gave a post-conviction affidavit as new evidence in which she stated that Petitioner's defense counsel never talked to her prior to the trial; however, she would have been happy to talk to defense counsel. (Michelle Wilson's Affidavit of Fact is included with the federal habeas petition). Had defense counsel asked Michelle Wilson the correct questions, she would have testified that Ryan Brock told her that he was sent to see four guys, however, Misty Powers was not one of the people that Ryan Brock was sent to see. Michelle Wilson knows Ryan Brock to be a violent person, and she knows applicant not to be a violent person. At the time of Petitioner Mr. Underwood's trial, Michelle Wilson did not

believe that Petitioner sent people to Stephenville to kidnap Misty Powers, nor does she now believe that Petitioner had anything to do with the kidnaping of Misty Powers. Michelle Dawn Smith observed the kidnaping of Misty Powers from a residence in Stephenville, Erath County, Texas, on May 4, 1998, and was called by the State as a witness in the trial. (RR 3:48) She testified at the trial that the kidnaping was about Misty Powers owing Petitioner Mr. Underwood money. (RR 3:77) Nevertheless, Michelle Dawn Smith truly believed that the kidnaping was more an act of revenge and stemmed from Misty Powers' and Ryan Brock's past differences. (Michelle Dawn Smith's Affidavit of Fact which is a part of the federal habeas petition). Although Michelle Dawn Smith was a witness for the State, she visited Petitioner Mr. Underwood in the Erath County Jail after he was arrested according to her affidavit. A few weeks later, Michelle Dawn Smith was arrested and released on bond. The Court placed stipulations on her bond that she was not to have any contact with Petitioner. She feels that her arrest and the stipulations placed on her bond were used as a means to secure her testimony for the State against Petitioner Mr. Underwood. Michelle Dawn Smith's trial was sometime after Petitioner's trial, therefore, at the time of Petitioner's trial, she felt that she was in no position to offer testimony that would not be cheerfully accepted by the State according to her affidavit. The night of the kidnaping Brock appeared to be under the influence of drugs or alcohol, and Brock's attitude changed when he and Michelle Dawn Smith had their confrontation at the door. Both Ryan Brock and Misty Powers at one time had been involved in relationships with Michelle Wilson., and Michelle Dawn Smith knew that Ryan Brock did not like Misty Powers and she did not like him. When Misty

Powers came out wearing Ryan Brock's cap that she had gotten from Michelle Wilson, Brock tried to appear calm, but Michelle Dawn Smith believed he was angry even when he left the first time. When Ryan Brock and the others came back the second time and the kidnaping took place, Ryan Brock showed no interest in the money when Misty Powers told him that she had it. Michelle Dawn Smith believed that this clearly showed that Ryan Brock was angry and his intentions were more of a personal nature according to her affidavit. Michelle Dawn Smith stated in her affidavit that she does not believe that Petitioner ordered or sent Ryan Brock or anyone to kidnap Misty Powers, but that it was a spontaneous act of violence initiated by Ryan Brock and that Daniel Garcia and Curtis Coffee responded at that time to help him. Michelle Dawn Smith was questioned before the trial by the District Attorney, but Petitioner's defense attorney never contacted her. Ryan Brock has given a post-conviction affidavit as previously unavailable evidence. (Ryan Brock's Affidavit of Fact is a part of the habeas petition). Ryan Brock, in the company of Curtis Coffee and Daniel Garcia did kidnap and abduct Misty Powers from a residence in Stephenville, Erath County, Texas, on May 4, 1998 according to his affidavit. The kidnaping and abduction were not preplanned or prearranged but was a spontaneous decision made by Ryan Brock, Curtis Coffee and Daniel Garcia at or near the time of the actual kidnaping. Petitioner did not plan nor mastermind the kidnaping and abduction nor were Ryan Brock, Curtis Coffee and Daniel Garcia working under Petitioner's orders, urging, or direction according to the affidavit. According to Ryan Brock, Petitioner could not have known about the kidnaping and abduction of Misty Powers, because Brock, Coffee and Garcia did not know it was going to occur until it did occur. Ryan Brock

did not and he is not aware of either Daniel Garcia or Curtis Coffee contacting applicant at any time prior to the kidnaping and abduction. Ryan Brock also stated in his affidavit that he was absolutely not acting under Petitioner's direction, order, or urging, and Petitioner did not have any knowledge of Ryan Brock's decision to kidnap and abduct Misty Powers. The affidavit affirms that the kidnaping and abduction of Misty Powers was a spontaneous, spur-of-the-moment occurrence. Misty Powers and Ryan Brock had experienced differences in the past over relationships that they both shared with Michelle Wilson, and the night of the kidnaping Ryan Brock still had resentment for Misty Powers because of her involvement with Michelle Wilson. Petitioner never sent Ryan Brock to collect money from Misty Powers. This incident had nothing to do with collecting money from Misty Powers for Petitioner Mr. Underwood and was in no way connected to the Petitioner according to the affidavit. Ryan Brock was under the influence of drugs and alcohol at the time and was out of control with anger when Misty Powers refused to go riding with him. Ryan Brock did not contact Petitioner until around noon on May 5, 1998, the day after the kidnaping. Ryan Brock contacted applicant in Taylor County, Texas. Petitioner persuaded Ryan Brock that Misty Powers should be released. There was no organization, conspiracy or collusion between Petitioner and Ryan Brock, Curtis Coffee or Daniel Garcia. Had Ryan Brock been in a position to give the above testimony during Petitioner's trial he would have done so. However, he was advised that without an offer of immunity from the prosecutor any testimony he gave could have been used against him in his trial. In addition, Ryan Brock believed that any favorable testimony given for Petitioner would have caused the prosecutor to treat Ryan Brock more harshly at

his trial. It was only after Ryan Brock's trial was concluded that he could reasonably and safely state the truth of Petitioner's innocence in the kidnaping of Misty Powers. Petitioner Mr. Underwood was convicted and on November 20, 1998, Petitioner was sentenced to 99 years confinement and a fine of $10,000.00 in Cause No. 10689.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ. The lower federal district and circuit courts that have addressed the constitutionality of the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act find that the limitation period is not a "per se" violation. SEE: *Green v. White*, 223 F.3d 1001 (9th Cir., 2000) The argument that the limitation period is not jurisdictional and could be subject to equitable tolling does not address the issue of the fact that the Congress has violated Article I, §9, clause 2 of the Constitution of the United States. This Honorable Court needs to address the issue. In *Swain v. Pressley*, 430 U.S. 372 (1977) found that establishing an alternative method to or procedure for habeas review did not violate the constitution, especially in light of the fact that habeas review remained as an available remedy if the motion practice proved to be either ineffective or inadequate. The statute in no way removed the right to collateral review, it simply provided another method for collateral review equal to a federal habeas review but with habeas still available when the new procedure fell short.

This is an important issue. The intent of Congress was to limit the number of federal habeas petitions and to place an arbitrary limit on the time when vindication of a federal right violation could be sought. *The time limit* encourages defendants to file some sort of petition so they do not lose the right. In addition, the short time bar does not allow for adequate investigation of facts not contained in the trial records. The number of persons who have been found to be innocent after ten or more years of wrongful incarceration would now have to remain incarcerated or be put to death unless they can fortuitously discover the exculpatory evidence instantly. This Court should decide if federal rights evaporate like rain on a desert rock after one year.

DOES THE ONE-YEAR STATUTE OF LIMITATIONS IMPOSED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT CREATE AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS IN VIOLATION OF ARTICLE I, §9, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES?

This Court decided in *Swain v. Pressley*, 430 U.S. 372 (1977) that Congress could provide procedures for collateral review of State court convictions so long as the new procedures were equivalent to the federal habeas review and that federal habeas review remained as a back-up to that procedure. This Court found that when Congress enacted §23-110(g) as a part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Congress established a procedure for collateral review of convictions in the Superior Court which procedures were

comparable to that authorized by 28 U.S.C. §2255 for the United States District Courts. *Swain v. Pressley*, 430 U.S. at 375, 97 S.Ct. 1224 at 1226-1227, 51 L.Ed.2d 411 (1977). This Court in reviewing the Suspension Clause challenge noted that Congress had constitutionally limited habeas review in the District Courts to the sentencing court and provided in 28 U.S.C. §2255 that no other Court could consider the habeas petition. The Court went on to reason that so long as comparable procedures were available to the defendant and the right of habeas review remained at all times, should the motion procedure prove inadequate or ineffective, the limitation on habeas review survived the Suspension Clause challenge. The Court noted that "Thus the only constitutional question presented is whether the substitution of a new collateral remedy which is both adequate and effective should be regarded as a suspension of the Great Writ within the meaning of the Constitution." With the Great Writ still available as a buffer, this Court held the substituted procedure constitutional. The reasoning of the Court seems to be that without the writ of habeas corpus still lingering in the shadows ready to right any federal violations if the new procedures proved inadequate or ineffective, the system would have failed the Suspension Clause challenge.

The one-year statute of limitations renders the writ of habeas corpus both ineffective and inadequate. An incarcerated defendant cannot in one year make the needed investigations of fact and law to determine what federal rights may have been violated. Tracking down facts which would demonstrate a violation of a federal right sometimes takes years. Randall Dale Adams, spared from the death penalty by this Court's decision in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), was

exonerated of any wrong doing in the case only years after that decision when police officers came forward and revealed the exculpatory evidence hidden by the prosecution. SEE: Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable To Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1807, 1813 (2000). Two leading forensic laboratories estimate that about 40 per cent of the cases reviewed on DNA post conviction writs are exonerated. *Innocence and Death*, 82 N. C. L. Rev. 61, 73, n. 38 (2003). In almost all of these cases, if the States had decided not to grant relief, the application of the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act would insure that innocent persons would remain incarcerated. One year is too short under the due process clauses of both the Fifth and Fourteenth Amendments to the Constitution of the United States. Also, because State court counsels do not move quickly enough, defendants are deprived of the effective assistance of counsel due to the application of the one-year statute of limitations. Since a defendant is not entitled to a federal writ attorney unless facing the death penalty, the incarcerated defendant is at the mercy of the overworked, possibly less than diligent state court attorneys. Not only is the one-year limitation period inequitable; more importantly it is an unconstitutional suspension of the writ. There is no remedy, there is no alternative review, there is no means of insuring the rights granted to the citizens by the Constitution in general and the Fourteenth Amendment in particular.

This Honorable Court should review this challenge to the one-year limitations period under the Suspension Clause and declare the limitation period unconstitutional

as an invalid suspension of the Great Writ. The declaration has two beneficial effects. One, it protects all citizens rights granted under the Constitution and two, it reduces the perceived need of inmates to file a federal habeas writ to protect their potential review by a federal court.

CONCLUSION AND PRAYER

This Honorable Court should grant review of the decision of the Fifth Circuit Court of Appeals in New Orleans and declare the one-year limitations period contained in the Antiterrorism and Effective Death Penalty Act unconstitutional and to remand the cause for a hearing on the writ of habeas corpus. Accordingly, Petitioner Mr. EDDIE D. UNDERWOOD respectfully prays that the petition for certiorari to the Fifth Circuit Court of Appeals sitting in New Orleans, Louisiana issue herein and for such other and further relief to which he may be justly entitled.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10967
USDC No. 4:03-CV-267-Y

EDDIE D. UNDERWOOD,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Apr. 6, 2004)

ORDER:

Eddie Dale Underwood (TDCJ # 852022) moves this court for a certificate of appealability (COA) following the district court's dismissal of his 28 U.S.C. § 2254 petition wherein he sought to challenge his 1998 conviction for engaging in organized criminal activity. The district court dismissed the petition as untimely under 28 U.S.C. § 2244(d). When, as here, a district court dismisses a habeas petition on procedural grounds, a COA may not issue unless the prisoner shows that "jurists of reason would find it debatable whether the petition states a valid

claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Underwood argues that application of the limitations period violates the Suspension Clause in his case. He also argues that he has made a showing of actual innocence warranting tolling of the limitations period. He cites "newly discovered evidence," affidavits which he contends show that he had nothing to do with the kidnaping that resulted in his conviction.

Underwood has failed to show that jurists of reason would debate the district court's dismissal of his petition as time-barred. Accordingly, Underwood's motion for a COA is DENIED. *See Slack*, 529 U.S. at 484.

MOTION DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES
CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDDIE D. UNDERWOOD, PETITIONER,	§	
V.	§	CIVIL ACTION NO. 4:03-CV-267-Y
JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, RESPONDENT.	§	

FINDINGS, CONCLUSION, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER

(Filed Jul. 15, 2003)

This cause of action was referred to the United States Magistrate Judge under 28 U.S.C. § 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusion, and Recommendation of the United States Magistrate Judge are as follows:

I. FINDINGS AND CONCLUSION

A. NATURE OF THE CASE

This is a petition for writ of habeas corpus by a state prisoner under 28 U.S.C. § 2254.

B. PARTIES

Petitioner Eddie D. Underwood is in custody of the Texas Department of Criminal Justice, Institutional Division.

Respondent Janie Cockrell is the Director of the Texas Department of Criminal Justice, Institutional Division.

C. PROCEDURAL HISTORY

On November 20, 1998, a jury found Underwood guilty of engaging in organized criminal activity and assessed punishment at 99 years' confinement. (2 State Habeas R. at 454.) The Eleventh District Court of Appeals affirmed the trial court's judgment, and the Texas Court of Criminal Appeals refused Underwood's petition for discretionary review on August 30, 2000. *Underwood v. State,* No. 11-99-013-CR (Tex.App. – Fort Worth Mar. 23, 2000, pet. ref'd) (not designated for publication). Thus, Underwood's conviction became final on November 28, 2000 – 90 days after the Court of Criminal Appeals refused his petition. SUP. CT. R. 13.1; *Flanagan v. Johnson,* 154 F.3d 196, 197 (5th Cir. 1998).

Underwood filed a state application for writ of habeas corpus on November 28, 2001, challenging his conviction. (2 State Habeas R. at 212.) The Court of Criminal Appeals denied Underwood's application without written order on the findings of the trial court. *Ex parte Underwood,* No. 47,385-02 (Tex. Crim. App. Aug. 21, 2002).[1] Underwood

[1] Underwood's first state habeas application challenged his May 17, 1999 conviction for possession of less than 28 grams of cocaine. *Ex*

(Continued on following page)

filed his federal petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Fort Worth Division, on April 7, 2003.

D. Issues

Underwood argues that newly discovered and previously unavailable evidence shows Underwood's actual innocence and that trial counsel was constitutionally ineffective.

E. Rule 5 Statement

Cockrell has filed an answer addressing only the statute-of-limitations issue and has not yet addressed whether Underwood has adequately exhausted available state remedies.[2]

F. Statute of Limitations

Cockrell argues that the petition for writ of habeas corpus is barred by the statute of limitations. Indeed, federal habeas corpus petitions are subject to a one-year statute of limitations:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a

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parte Underwood, No. 47,385-01 (Tex. Crim. App. Nov. 8, 2000) (not designated for publication) (1 State Habeas R. at 81.) Underwood does not challenge this conviction in the instant action. (Federal Pet. at 2.)

[2] Although Cockrell states that she will address the exhaustion requirement "should this court deny [her] motion to dismiss," Cockrell has not filed a motion to dismiss. (Resp't Answer at 2.)

person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

Cockrell asserts that because Underwood is challenging the underlying conviction, the limitations period began to run when the conviction became final – November 28, 2000. (Resp't Answer at 4.) Underwood argues that limitations did not begin to run until July 16, 2001 – the date of trial counsel's affidavit – when he discovered the factual predicate for his habeas petition. (Federal Pet. at 3; 2

State Habeas R. at 409.) But Underwood fails to allege how trial counsel's affidavit uncovered the grounds raised in his habeas petition. Indeed, evidence of Underwood's innocence and counsel's actions or inactions should have been known to Underwood once his conviction was final. *Cf. Robison v. Johnson,* 151 F.3d 256, 263 (5th Cir. 1998) (holding petitioner's failure to discover best evidence of constitutional violation does not excuse procedural default because factual basis for claim available to petitioner when state habeas application filed), *cert. denied,* 526 U.S. 1100 (1999). This is borne out by the fact that the vast majority of the affidavits Underwood relies on to show his actual innocence were signed either before his conviction became final or before limitations expired on November 28, 2001. (Federal Pet. at Apps. A-D, G, I.) Thus, limitations began to run when Underwood's conviction became final.

Absent application of any tolling provision, Underwood's federal petition was due on or before November 28, 2001. If, however, a state prisoner files a timely state post-conviction application for habeas corpus review, the time taken to pursue that remedy is not counted toward the limitation period. 28 U.S.C. § 2244(d)(2); *Brewer v. Johnson,* 139 F.3d 491, 493 (5th Cir. 1998). Thus, the statute of limitations was clearly tolled from November 28, 2001 until August 21, 2002 – during the pendency of Underwood's state habeas corpus application – for a total of 266 days. Excluding the allowable, 266-day period, Underwood's federal petition was due on August 21, 2002.

Underwood argues, however, that limitations should be equitably tolled because he is actually innocent; thus, this fundamental miscarriage of justice defeats any limitations bar. (Federal Pet. at 3-4.) He bases his actual-innocence

claim on the fact that his codefendants and the victim would testify that Underwood had nothing to do with planning or executing the kidnapping, which was the predicate offense for the charge of engaging in organized criminal activity. (*Id.* at 7-17.) In order for such a claim to be credible, "a claim of actual innocence must be based on reliable evidence not presented at trial." *Calderon v. Thompson,* 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo,* 513 U.S. 298, 324 (1995)). Finally, actual innocence "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup,* 513 U.S. at 329. The statute of limitations can be equitably tolled, but only in "rare and exceptional circumstances." *Davis v. Johnson,* 158 F.3d 806, 811 (5th Cir. 1998), *cert. denied,* 526 U.S. 1074 (1999).

First, actual innocence is neither a rare nor an exceptional circumstance and is insufficient to trigger equitable tolling. *Cousin v. Lensing,* 310 F.3d 843, 849 (5th Cir. 2002), *cert. denied,* 123 S.Ct. 2277 (2003). This seems especially valid when the actual-innocence evidence was discovered before the limitations period expired. Second, the victim testified at trial that Underwood was not involved the day of the kidnapping and was the one who released her the next day. (Federal Pet. at 8.) Thus, Underwood's actual-innocence evidence was presented at trial and cannot now be considered a fundamental miscarriage of justice. Third, Underwood's own allegations reflect that he did not pursue "the process with diligence and alacrity." *Phillips v. Donnelly,* 216 F.3d 508, 511 (5th Cir.), *clarified on reh'g,* 223 F.3d 797 (5th Cir. 2000). Not only did Petitioner delay the filing of his state habeas applications, but he also waited over seven months after his

application was denied before filing his federal petition. Underwood's own delay mitigates against the application of equitable tolling. *Ott v. Johnson,* 192 F.3d 510, 514 (5th Cir. 1999), *cert. denied,* 529 U.S. 1099 (2000).

G. Conclusion

Underwood's federal petition, due November 28, 2001, was not filed until April 7, 2003 and is, thus, untimely.

II. RECOMMENDATION

The petition for writ of habeas corpus, filed over seven months after limitations had expired, should be dismissed with prejudice as time-barred.

III. NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSION, AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusion, and recommendation within ten (10) days after the party has been served with a copy of this document. The court is extending the deadline within which to file specific written objections to the United States Magistrate Judge's proposed findings, conclusion, and recommendation until August 5, 2003. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusion, and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(b)(1). Failure to

file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding or legal conclusion accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc); *Carter v. Collins,* 918 F.2d 1198 (5th Cir. 1990).

IV. ORDER

Under 28 U.S.C. § 636, it is ORDERED that each party is granted until August 5, 2003 to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusion, and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, the response shall be filed within seven (7) days of the filing date of the objections.

It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, is returned to the docket of the United States District Judge.

SIGNED July 15, 2003.

/s/ Charles Bleil
CHARLES BLEIL
UNITED STATE
MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDDIE D. UNDERWOOD, Petitioner,	§	
VS.	§	
DOUGLAS DRETKE, Director, T.D.C.J., Correctional Institutions Division,[1] Respondent.	§	CIVIL ACTION NO. 4:03-CV-267-Y

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS
(With Special Instructions to Clerk of the Court)

(Filed Sept. 2, 2003)

In this action brought by petitioner Eddie D. Underwood under 28 U.S.C. § 2254, the Court has made an independent review of the following matters in the above-styled and numbered cause:

[1] Because the Texas Department of Criminal Justice, Institutional Division was recently changed to the Texas Department of Criminal Justice, Correctional Institutions Division, and Douglas Dretke was named the Director, Dretke should "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The clerk of Court is directed to change the identification of respondent on the docket as listed in the style of this order: Douglas Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

1. The pleadings and record;

2. The proposed findings, conclusions, and recommendation of the United States Magistrate Judge filed on July 15, 2003; and

3. The petitioner's written objections to the proposed findings, conclusions, and recommendation of the United States Magistrate Judge filed on August 19, 2003.[2]

The Court, after *de novo* review, finds and determines that petitioner Eddie D. Underwood's objections must be overruled, and that the petition for writ of habeas corpus should be dismissed with prejudice, for the reasons stated in the magistrate judge's findings and conclusions, and as set forth herein.

In his written objections to the magistrate judge's report and recommendation that this petition be deemed time-barred, Underwood, through counsel, contends that he should not be held time-barred by the failure of post-conviction counsel to act diligently. Underwood does not support this allegation with fact, but apparently argues in general that the failure of habeas counsel to act diligently is cause for equitable tolling. Underwood's present counsel[3] makes such argument without acknowledging that it has been expressly rejected in this circuit: "[I]f there were ever any doubt that an attorney's error or neglect does not

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[2] As permitted by the order granting an extension of time to file written objections.

[3] The state writ application was filed on Underwood's behalf by attorney Hal E. Turley. This federal petition was filed by attorney Danny D. Burns.

warrant equitable tolling, our recent decision in *Cousin v. Lensing,* 310 F.3d 843 (5th Cir. 2002) erased it: '[M]ere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified.'"[4] Thus, this objection is overruled.

Furthermore, Underwood argues that the failure to afford him equitable tolling credit is an unconstitutional suspension of the writ. Again, counsel fails to acknowledge Fifth Circuit authority rejecting a similar argument:

> The 1-year limitations period of the AEDPA does not violate the Suspension Clause of Art. 1, § 9 [of the Constitution] unless it "renders the habeas remedy 'inadequate or ineffective' to test the legality of detention." [Petitioner] has not shown how the limitations period made the habeas remedy inadequate or ineffective for him, since nothing prevented him from filing a petition before the limitations period expired.[5]

Thus, Underwood's objection that application of the limitation period to him is an unconstitutional suspension of the writ is overruled.

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[4] *United States v. Riggs,* 314 F.3d 796, 799 (5th Cir. 2002), *cert den'd,* 123 S.Ct. 2630 (2003).

[5] *See Molo v. Johnson,* 207 F.3d 773, 775 (5th Cir. 2000) (citation omitted); *see generally Wyzkowski v. Department of Corrections,* 226 F.3d 1213, 1217 (11th Cir. 2000) ("[e]very court which has addressed the issue – *i.e.,* whether, as a general matter, § 2244(d) constitutes an unconstitutional suspension of the writ – has concluded that it does not") (multiple citations omitted).

It is therefore ORDERED that the findings, conclusions, and recommendation of the magistrate judge should be, and are hereby, ADOPTED.

It is further ORDERED that Petitioner's Petition for Writ of Habeas Corpus be, and is hereby, DISMISSED WITH PREJUDICE.

It is further ORDERED that the clerk of the Court shall transmit a copy of this order to Petitioner by certified mail, return receipt requested.

SIGNED September 2, 2003.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDDIE D. UNDERWOOD, Petitioner,	§	
vs.	§	CIVIL ACTION
DOUGLAS DRETKE, Director, T.D.C.J., Correctional Institutions Division, Respondent.	§	NO. 4:03-CV-267-Y

FINAL JUDGMENT

(Filed Sep. 2, 2003)

Pursuant to an Order issued this same day, and Federal Rule of Civil Procedure 58:

It is hereby ORDERED, ADJUDGED, and DECREED that Petitioner's Petition for Writ of Habeas Corpus be, and is hereby, DISMISSED WITH PREJUDICE.

It is further ORDERED that all costs of court are taxed against the party that incurred them.

SIGNED September 2, 2003.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
FORT WORTH DIVISION

EDDIE D. UNDERWOOD	§	
Petitioner	§	
vs	§	NO. 4:03-CV-267-Y
JANIE COCKRELL, DIRECTOR	§	
TEXAS DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
INSTITUTIONAL DIVISION,	§	
Respondent	§	

NOTICE OF APPEAL

(Filed Sep. 16, 2003)

TO THE HONORABLE JUDGE TERRY MEANS; UNITED STATES DISTRICT JUDGE:

COMES NOW EDDIE D. UNDERWOOD, by and through his attorney of record and pursuant to Rule 4 of the Federal Rules of Appellate Procedure files this his notice of appeal to the Fifth Circuit Court of Appeals in New Orleans, Louisiana from the judgment and sentence entered by the court on September 2, 2003.

Petitioner **EDDIE D. UNDERWOOD,** requests the Court to grant a certificate of appealability.

Dated: September 16, 2003.

/s/ Danny D. Burns

DANNY D. BURNS
State Bar No. 03443800
115 North Henderson Street
Fort Worth, Texas 76102-1940
817-870-1544 FAX 870-1589

Attorney for Appellant

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDDIE D. UNDERWOOD,	§	
	§	
VS.	§	CIVIL ACTION
DOUGLAS DRETKE, DIRECTOR, T.D.C.J., Correctional Institutions DIV.,	§	NO. 4:03-CV-267-Y
	§	
	§	
RESPONDENT.	§	
	§	

ORDER THAT CERTIFICATE OF APPEALABILITY SHOULD NOT ISSUE

(Filed Sep. 25, 2003)

On September 16, 2003, petitioner Eddie D. Underwood filed a notice of appeal from this Court's order dismissing his petition under 28 U.S.C. § 2254. Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253.[1] The COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."[2] A petitioner satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the

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[1] *See* FED. R. APP. P. 22(b).

[2] 28 U.S.C.A. § 2253(c)(2) (West Supp. 2003).

issues presented are adequate to deserve encouragement to proceed further."[3]

The Court dismissed this petition as barred by the time limitations in 28 U.S.C. § 2244(d). Upon review and consideration of the record in the above-referenced case as to whether petitioner Underwood has made a showing that reasonable jurists would question this Court's procedural ruling, the Court determines that a certificate of appealability should not issue for the reasons stated in the July 15, 2003, Findings, Conclusions and Recommendation of the United States Magistrate Judge, and for the reasons stated in the September 2, 2003, Order Adopting Magistrate Judge's Findings and Conclusions.[4]

It is therefore ORDERED that a certificate of appealability should not issue.

SIGNED September 25, 2003.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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[3] *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1034 (2003), *citing Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[4] *See* FED. R. APP. P. 22(b); *see also* 28 U.S.C.A. § 2253(c)(2) (West Supp. 2003).

APPENDIX G

CAUSE NO. 10689

THE STATE OF TEXAS	§ IN THE DISTRICT COURT
VS	§ 266TH JUDICIAL DISTRICT
EDDIE DALE UNDERWOOD	§ ERATH COUNTY, TEXAS

JUDGMENT ON VERDICT OF GUILTY BY JURY
PUNISHMENT FIXED BY JURY –
PROBATION NOT GRANTED

(Filed Nov. 24, 1998)

JUDGE PRESIDING: Honorable Donald R. Jones	DATE OF JUDGMENT: November 20th, 1998
ATTORNEY FOR THE STATE: John Terrill	ATTORNEY FOR THE DEFENDANT: Jim Parker

OFFENSE CONVICTED OF: Engaging in Organized Criminal Activity (Enhanced) *TEXAS PENAL CODE,* §20.04(a)(b)(c); 71.02(a)(1)(b); 12.42(c)(1)

DEGREE OF OFFENSE: First Degree Felony (enhanced)	DATE OFFENSE COMMITTED: May 4th, 1998
CHARGING INSTRUMENT: Indictment	PLEA: NOT GUILTY
VERDICT: Found GUILTY by Jury Jury assessed Punishment	FOREMAN OF THE JURY: Charles S. Peek, Jr.
PLEA TO ENHANCEMENT: Not True	FINDING ON ENHANCEMENT: True to Enhancement Paragraph

FINDING ON USE OF A DEADLY WEAPON:
Affirmative finding in the use or exhibition of a deadly weapon during the commission of this offense

DATE SENTENCE IMPOSED:
November 20th, 1998

COSTS: $240.25 Court Cost
$.00 Attorney Fee

PUNISHMENT AND PLACE OF CONFINEMENT:
Ninety-nine (99) Years confinement in the Institutional Division of the Texas Department of Criminal Justice and a fine of $10,000.00

DATE TO COMMENCE:
November 20th, 1998

TIME CREDITED:
5/20/98 to 11/20/98 for a total of 184 days.

TOTAL AMOUNT OF RESTITUTION OR REPARATION: $.00

On the 16th day of November, 1998 this cause was called for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in Open Court, and the above-named counsel for the Defendant also being present; and the said Defendant having been duly arraigned and it appearing to the Court that the Defendant was mentally competent, and having plead as shown above in the indictment herein, the State announced ready; and thereupon a jury, to-wit: the above named Foreman and eleven others was duly selected, impaneled, and sworn, who having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant and Defendant's counsel being present, and returned into Open Court the verdict of GUILTY as set forth above, which was received by the Court and is here

now entered upon the minutes of the Court as shown above.

Thereupon, the Defendant elected to have punishment assessed by the Jury and such jury was called back into the box and heard evidence relative to the question of punishment and having been duly charged by the Court, they retired to consider such question, and after having deliberated, they returned into the Court the verdict shown under punishment above.

On November 20th, 1998, this cause was called for sentencing hearing and the Defendant appeared with his attorney and announced ready and the State appeared through its District Attorney and announced ready, and after considering the evidence and argument of both counsel, the Jury assessed punishment as set forth above.

IT IS, THEREFORE, CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that the said judgment be, and the same is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above as found by the verdict of the jury, as shown above; and that the Defendant is sentenced to a term of imprisonment as set forth above, and that said Defendant be delivered by the Sheriff to the Director of the Institutional Division of the Texas Department of Criminal Justice of the State of Texas, or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above-named term in accordance with the provisions of law governing such punishments and execution may issue as necessary.

And the said Defendant is remanded to jail until said Sheriff can obey the direction of this Court.

SIGNED AND ORDERED:

November 20th, 1998 /s/ Donald R. Jones
Judge Presiding

I, EDDIE DALE UNDERWOOD, do hereby certify that I am one and the same person convicted of the offense of Engaging in Organized Criminal Activity (Enhanced) on the 20th day of November, 1998, in Cause No. 10689, in the 266th Judicial District Court of Erath County, Texas. I further certify that the inked fingerprint impression which appears in the box below was made by my right thumb ~~or other finger listed~~: _____.

[Fingerprint]

RIGHT THUMB
OR OTHER
FINGER LISTED > /s/ Eddie Dale Underwood
EDDIE DALE UNDERWOOD
Defendant's Signature

I, Thomas E. Pack, District Clerk for the 266th Judicial District Court of Erath County, Texas, do attest that the above Defendant, EDDIE DALE UNDERWOOD, was convicted in the 266th Judicial District Court of Erath County, Texas, on the 20th day of November, 1998, in Cause No. 10689 for the offense of Engaging in Organized Criminal Activity (Enhanced). Furthermore, the above inked fingerprint impression was made by the same EDDIE DALE UNDERWOOD who was convicted in this cause:

/s/ Thomas E. Pack
District Clerk
266th Judicial District
Erath County, Texas

by: _____
Deputy

APPENDIX H

11th Court of Appeals

Eastland, Texas

Opinion

Eddie Dale Underwood

Appellant

Vs. No. 11-99-00013-CR – Appeal from Erath County

State of Texas

Appellee

The jury convicted appellant of the offense of engaging in organized criminal activity by committing the offense of aggravated kidnapping. The jury assessed appellant's punishment at confinement for 99 years and a fine of $10,000. We affirm.

In his first two issues on appeal, appellant challenges both the legal and the factual sufficiency of the evidence. In conducting a legal sufficiency review, we must examine all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Geesa v. State, 820 S.W.2d 154 (Tex.Cr.App. 1991). In deciding whether the evidence is "factually" sufficient to support the conviction, we must review all of the evidence to determine if the verdict is so against the great weight of the evidence as to be clearly wrong and unjust. Johnson v. State, ___ S.W.3d ___ (No. 11915-98, Tex.Cr.App., February 9, 2000) (not yet reported); Clewis v. State, 922 S.W.2d 126 (Tex.Cr.App.1996).

Appellant, among others, sold or otherwise furnished illegal drugs to Misty Powers who had a problem with drug use. At the time of the offense, Powers owed money to appellant for drugs he had supplied her in the past.

On May 4, 1998, Powers received a phone call from appellant regarding that drug debt. Appellant had talked to her once or twice before about the debt. This time, "[h]e seemed more agitated or upset about it." He told Powers that he wanted "to know where his g-----n money was." Appellant told Powers that she would be hearing from him or someone else "in like two days." That same day, a person by the name of Ryan Brock came from Abilene to Stephenville. There was testimony that he had been sent there by appellant to "take care of business." There was also testimony in the record that Brock denied that he was taking care of appellant's business. Other testimony reveals that a part of that business involved collecting drug money owed to appellant by Philip Mosher. Brock looked for Mosher that day but was unable to find him. He did collect money from another person who lived in an apartment in the area. Daniel Garcia and David Coffee were with him at the time. Garcia testified that it was his belief that the money collected at the apartment, as well as the money Brock wanted to collect from Powers and Mosher, was being collected for appellant. Around 10:00 or 11:00 that same evening, while he was still in Stephenville, Brock went to the house where Powers was staying. Brock and Powers did not like each other because Brock dated a lady with whom Powers had previously had a relationship. Brock attempted to get Powers to leave with him. Powers would not, and Brock left.

Brock had not been gone long when he returned with Garcia and Coffee. They were now dressed in black

clothing which they had earlier purchased for this purpose. They also covered their faces with bandannas. Coffee went to the front door of the house while Brock and Garcia went to the back of the house. Coffee kicked in the front door, and Powers tried to escape out the back door. Brock grabbed Powers and forcefully and against her will put Powers in a van which he had borrowed from a friend. At some point during this time, Powers was hit in the head. Brock and Coffee were armed. The three men, along with Powers, left in the van. They stopped not too far away at another house where Coffee retrieved his motorcycle and left on his own. Brock and Garcia drove to a rural, wooded place outside of Stephenville. When they arrived there, the men taped Powers to a tree with duct tape. She remained taped to the tree during the night. Powers earlier had been restrained with duct tape, and Brock had also put duct tape over her eyes and mouth. She was not able to leave.

The next morning, Powers, while she was still restrained and blindfolded, was placed in the van and taken to Abilene by Brock and Garcia. On the way to Abilene, Powers fell asleep. Powers testified that the next thing she remembered was the sound of appellant's voice as he was asking her to shake her head. Brock had picked up appellant in Abilene and, at appellant's direction, began driving toward some country property owned by appellant's parents. Garcia testified that appellant began to yell at Powers, "he was telling her that she should have paid him his money, if she'd got his money, we wouldn't have had no problems if you would have paid my money, you know." Garcia also testified that appellant had a gun and was handling it in such a manner as to make it appear that he intended to shoot Powers. Finally, according to Garcia, appellant told Powers, "[Y]ou caught me on a good day, you

know, I'm going to let you go, you go back and tell all your friends, everyone that owed me money, that I want my money and I ain't playing around.' Appellant removed the tape from Powers' eyes and mouth. Powers told appellant that she had his money, and arrangements were made for her to pay a third party when she returned to Stephenville. Appellant, Brock, Garcia, and Powers then drove back to Abilene.

Mosher heard about the kidnapping the day after it occurred. He contacted the police and offered to help them. Under the supervision of the police, Mosher made several cell phone calls to appellant. The calls were made for the purpose of attempting to locate the particular cell phone appellant was using and, thereby, hopefully also to locate Powers. These cell phone calls were recorded. During the first conversation, appellant told Mosher, "[Y]ou gonna pay me my f-----g money, that's whatcha gonna do!!! You gonna be next, Dog!" Appellant, during the second conversation, told Mosher that he had "a dead m----r-f----r in the trunk . . . and I'm fixin to come put your bitch a-s there if you don't pay me. That's what's wrong with me. Do you understand? I'm tired of f-----g with you. Your an expendable part of this dude. You're not a necessity." Finally, during the final conversation, appellant threatened that he had "a bullet with [Mosher's] f-----g name on it."

Earlier, the Abilene Police Department had received information concerning the kidnapping and had been asked to watch for the van. Officer Don Brown heard a radio transmission seeking backup in stopping the van that they had been watching. He went to the scene of the traffic stop. Officer Brown noticed that another officer was in the process of arresting Brock. He saw two more persons in the van. As Officer Brown was getting Garcia out

of the front passenger seat and arresting him, appellant "started the van and was placing it in gear." Officer Brown tried to stop the van, but appellant "[f]loorboarded it, full acceleration." Appellant told Powers to get in the front seat and put her seat belt on; they were "driving . . . really fast and . . . kept running from the cops." Finally, appellant told Powers that he was going to get out and for her to "just drive." While still eluding the police in Abilene, appellant got out of the van, and Powers eventually found her way back to Stephenville.

TEX. PENAL CODE ANN. § 71.02 (Vernon Supp. 2000) provides that a person commits the offense of organized criminal activity:

> [I]f, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, he commits or conspires to commit one or more of the following: [A]ggravated kidnapping, kidnapping.

TEX. PENAL CODE ANN. § 20.04(b) (Vernon Supp. 2000) provides that a person commits the offense of aggravated kidnapping "if the person intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense."

The jury was the sole judge of the credibility of the witnesses and the weight to be given their testimony, and it was free to believe or disbelieve any part or all of the testimony. TEX. CODE CRIM. PRO. ANN. arts. 36.13 & 38.04 (Vernon 1979 & 1981); Beardsley v. State, 738 S.W.2d 681, 684 (Tex.Cr.App.1987). Under this record, a rational trier of fact could have found the essential elements of the crime of organized criminal activity beyond a

reasonable doubt. Furthermore, the verdict is not so against the great weight of the evidence as to be clearly wrong and unjust. Jackson v. Virginia, supra; Johnson v. State, supra; Clewis v. State, supra; Geesa v. State, supra. Appellant's first two issues are overruled.

In his third issue on appeal, appellant argues that the trial court erred in admitting testimony and other evidence when the State had not complied with the trial court's standing pretrial order. Both parties agree that they knew of the standing order. Specifically, appellant argues three points.

First, appellant urges that Garcia was not listed as a witness for the State as required by the standing order and, therefore, should not have been allowed to testify over his objection. If a witness who is not named on a witness list furnished to the defendant is allowed to testify, the standard of review is whether the trial court abused its discretion in allowing the witness to testify. Bridge v. State, 726 S.W.2d 558, 566 (Tex.Cr.App.1986). Among the factors which will be considered by the appellate court in determining whether the trial court abused its discretion is whether the prosecution acted in bad faith in failing to disclose the name of the witness. Bridge v. State, supra; Hightower v. State, 629 S.W.2d 920, 925 (Tex.Cr.App.1981). Under this record, there is no evidence of bad faith on the part of the prosecutor.

Another factor in the determination of whether the trial court abused its discretion is whether the defendant could reasonably have anticipated that the witness would testify despite the absence of his name on the witness list. Hightower v State, supra. Garcia was a participant in the kidnapping of Powers. Appellant could have reasonably

anticipated that Garcia could have been called as a witness under TEX. PENAL CODE ANN. § 71.04 (Vernon 1994). Furthermore, appellant had previously been indicted in another cause for this same offense. Garcia had been disclosed as a potential witness in that cause. That indictment was dismissed. However, when he was subsequently reindicted for the same offense, appellant could reasonably have anticipated that Garcia would testify.

Appellant also complains of the State's failure to notify appellant of special treatment allegedly received by Mosher. Appellant asserts that Item 3 of the trial court's standing order required the State to identify, prior to trial, the nature of any agreement with any prospective witness, "including particularly any agreement not to prosecute the witness for criminal acts or to recommend a particular punishment in the disposition of a criminal case." The trial court's order is not in the record so we are unable to address this assertion since it relies on the specific language of the order and not on the general agreement of the parties that an order existed. Appellant also complains that the State's failure to disclose evidence which could have been used to impeach Mosher created the probability of harm sufficient to undermine confidence in the outcome of the trial. Johnston v. State, 917 S.W.2d 135 (Tex.App. – Fort Worth 1996, pet'n ref'd). We disagree.

The day after the kidnapping occurred, Mosher called the police and offered to help locate appellant. Mosher asked the police if they would arrest him if he came to the station. The police agreed that they would not arrest him if he would help them find appellant. There is no evidence in the record, however, that any other agreement existed between the police and Mosher beyond the resolution of the kidnapping. Appellant complains that he did not

receive knowledge of Mosher's participation until Officer Ed Bradshaw and Officer Scotty Chew testified during trial. Therefore, appellant argues that he was unable to properly prepare his defense and unable to properly cross-examine Mosher.

Impeachment evidence is considered to be favorable to the accused and is, therefore, subject to the mandatory disclosure dictates of Brady v. Maryland, 373 U.S. 83 (1963). United States v. Bagley, 473 U.S. 667, 676 (1985). Failure to disclose impeachment evidence will only result in a constitutional violation if there is a reasonable probability that the result of the proceeding would have been different. Etheridge v. State, 903 S.W.2d 1, 20 (Tex.Cr.App. 1994). The court in Etheridge concluded that the trial court did not abuse its discretion in admitting the evidence because appellant became aware of the information while the witness was testifying and "actually used his testimony to impeach the witness before the jury." In this case, the trial court allowed appellant to recall Mosher to "delve into this as deeply as he wishes to in regard to the credibility of that witness." Since appellant was able to use the impeachment information to cross-examine Mosher during trial, we cannot conclude that there was a reasonable probability that the result of this proceeding would have been different. The trial court did not abuse its discretion in admitting this evidence.

Similarly, appellant's final complaint relies on the specific language of the trial court's standing order. Appellant argues that the tape recorded conversation between Mosher and appellant was inadmissible as a matter of law because the tape recording was not identified in compliance with the standing order. Appellant basis his argument on Item 4 of the standing order which appellant

quotes as requiring the State to provide appellant a "summary, or description of the substance, of any statement made by the Defendant about any matter involved in this case." The State is in disagreement with the language quoted by appellant. Because the standing order does not appear in the record, we are unable to address whether the tape-recorded conversation between Mosher and appellant was subject to pretrial discovery under the court's order. Moreover, appellant's only objection at trial was to the proper identification of the recorded conversations. Appellant asserts that there was no showing that the voice on the tape was that of appellant. Mosher testified, however, that appellant's voice was on the tape. The trial court overruled appellant's objection and allowed the introduction of the tape and its transcription. The tape was not only identified by Mosher, someone with personal, firsthand knowledge of appellant's voice and someone who was present when the cell phone calls were made; but Officer Chew also testified he recognized appellant's voice in the conversations. The trial court did not err in allowing the introduction of the tape-recorded conversations between Mosher and appellant. Appellant's third issue is overruled.

Appellant argues in his fourth issue on appeal that the trial court erred in admitting irrelevant and highly prejudicial evidence of extraneous offenses which were not substantially connected to the charged offense. The State introduced testimony from Officer Brian Cokonougher and Randy Martin concerning an extraneous assault. Appellant objected that the assault was not listed in compliance with the court's standing order and that its introduction violated TEX.R.EVID. 401, 403, and 404.

Officer Cokonougher testified that he had investigated an assault on Martin but that no arrests were made in connection with that assault. The assault occurred less than one month prior to the kidnapping of Powers. Martin testified that appellant and three of his friends came to Martin's house looking for money that Martin owed appellant for illegal drugs. Appellant left without his money and returned that night with Brock and two others, wearing black bandannas and dark clothing and carrying handguns. Martin testified that he was hit in the back of the head with one of the guns.

The State properly notified appellant of the criminal history which would be introduced under Rule 404(b). Rule 404(b) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The State may seek to admit evidence, however, for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b). Before evidence of extraneous crimes is admissible under a Rule 404(b) exception, it must be "logically relevant for a purpose other than proof of appellant's bad character." Ladd v. State, 3 S.W.3d 547, 568 (Tex.Cr.App.1999). Under Rule 401, relevant evidence is evidence that has a tendency to make the existence of any fact more probable or less probable than it would be without the evidence.

The trial court reviewed the evidence and held that it was relevant and admissible under Rule 404(b) based on the following similarities between the assault on Martin and the aggravated kidnapping of Powers. The court stated that:

> [T]he commonality of the events is striking to me, similarity of the events, the proximity and

> time between the Abilene matter and the one in Erath County, both arising out of the same thing, that is, a drug transaction, involving a debt which hasn't been paid, both involved a forced entry, both involved use of dark clothing and bandannas, masks, the dress was similar in both cases, there's a commonality of participants in the cases, at least two of the four people have been tied to both, the use of weapons, the use of force, threats, the use of violence in each of the two transactions is similar . . . and the fact that there was contact earlier in the day and then a confrontation later on the same day in this type of transaction . . . also to the Court shows a commonality between the two events.

We hold that the trial court did not abuse its discretion in admitting the evidence. The trial court could have reasonably concluded that evidence of the extraneous assault was admissible to prove motive, opportunity, intent, or preparation for the kidnapping. Even assuming that the trial court erred in admitting the evidence, we do not believe, considering all the evidence before the jury, that the error affected appellant's substantial rights. TEX.R.EVID. 103(a).

Although relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Rule 403. Moreno v. State, ___ S.W.3d ___ (No. 0710-97, Tex.Cr.App., October 27, 1999) (not yet reported), quoting Montgomery v. State, 810 S.W.2d 372, 389 (Tex.Cr.App.1991), states:

> When Rule 403 provides that evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,' it

> simply means that trial courts should favor admission in close cases, in keeping with the presumption of admissibility of relevant evidence.

Therefore, trial courts exercise broad discretion in close cases. Moreno v. State, supra. We hold that the probative value of the extraneous offense was not substantially outweighed by its prejudicial value. The trial court did not abuse its discretion in admitting the evidence. Appellant's fourth issue is overruled.

In his fifth issue on appeal, appellant argues that the trial court erred in failing to instruct the jury concerning the circumstances under which the offense of kidnapping was completed. Under the record in this case, there can be no doubt that a kidnapping occurred. The abduction was a continuous, ongoing event. See Weaver v. State, 657 S.W.2d 148, 150 (Tex.Cr.App.1983). Appellant was present for several hours while Powers was being held against her will. The kidnapping continued from the moment Powers was forcibly abducted until appellant left the van. The trial court did not err in refusing the requested instruction. Appellant's fifth issue is overruled.

The judgment of the trial court is affirmed.

/s/ Jim R. Wright
JIM R. WRIGHT
JUSTICE

March 23, 2000

Do not publish. See TEX.R.APP.P. 47.3(b).

Panel consists of: Arnot, C.J., and
Wright, J., and McCall, J.

APPENDIX I

[SEAL]

Court of Appeals
Eleventh District of Texas

[Names And Addresses Omitted In Printing]

September 27, 2000

Deborah R. Smith Mcclue	John Terrill
Attorney At Law	District Attorney
P. O. Box 15125	P.O. Box 30
Amarillo, TX 79015	Stephenville, TX 76401

RE: Appellate Case Number: 11-99-00013-CR
Trial Court Case Number: 10,689

Style: Underwood, Eddie Dale v. The State of Texas

We have this day received the record from the Court of Criminal Appeals in which Petition for Discretionary Review was refused in the above cause.

Mandate will be issued by our Court after fifteen days from the date of this letter.

Respectfully yours,

Sherry Arledge, Clerk

/s/ Diana Reynolds
By: Diana Reynolds, Deputy

APPENDIX J

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

RE: Writ No. 47,385-01 [Stamped Nov. 10, 2000]
STYLE: Eddie Dale Underwood
TRIAL CT NO: 9815-A
November 8, 2000

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

EDDIE DALE UNDERWOOD TDC# 852022
C/O DEBORAH SMITH MCCLURE
ATTORNEY AT LAW P O BOX 15125
AMARILLO TX 79105

APPENDIX K

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

RE: Writ No. 47,385-02 [Stamped Aug. 22, 2002]
STYLE: Eddie Dale Underwood
TRIAL CT NO: 10689-A
August 21, 2002

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

EDDIE DALE UNDERWOOD TDC# 852022
C/O HAL E TUPLEY
ATTORNEY AT LAW 2501 OAK LAWN AVE
SUITE 350
DALLAS TX 75219